

## PART 533—PROTESTS, DISPUTES, AND APPEALS

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### Subpart 533.1—Protests

#### 533.101 Definitions.

*Associate General Counsel* means the Associate General Counsel of the General Law Division, Personal Property Division, or Real Property Division.

#### 533.102 General.

Except as indicated in this subpart, the Office of General Counsel (OGC) is responsible for all contacts with the GAO or GSBCA, potential contractors, attorneys, and any other persons, concerning protests of GSA contract actions filed with the Comptroller General or GSBCA.

#### 533.103 Protests to the agency.

When a protest is filed only with the agency, the contracting officer is required to issue a written response to the protest. An agency protest is deemed to be filed with the agency when the complete protest is received at the location designated in the solicitation for service of protests. If the complete protest is actually received

by the contracting officer at an earlier time, the protest shall be deemed to be filed when received by the contracting officer.

When a protest is filed only with the agency, an award may not be made until a decision on the protest is issued, unless the contracting director first makes the determination required by FAR 33.103(a)(2). The protestor must be notified in writing of the contracting officer's decision in a timely manner.

[56 FR 47006, Sept. 17, 1991]

#### 533.104 Protests to GAO.

(a) *General procedures.* (1) In addition to the requirements of FAR 33.104(a)(3), the agency report must contain the GAO protest number (GAO case file number), the solicitation or contract number, the full corporate name of the protesting organization and other firms involved, and a statement indicating whether the protest was filed before or after award. If the protest is filed after award, the report must contain the identity of the awardee, the date of award, the contract number, the date and time of bid opening (including a statement when the date of bid opening was extended by subsequent amendments), the total number of offerors, a complete chronological statement of all relevant events and administrative actions taken (including reasons and authority for the actions taken), and any other relevant documents believed helpful in determining the validity of the protest. (This evidence should be referenced and identified within the text of the position statement, alphabetically or numerically, e.g., Tab A, Exhibit 1, etc.)

(2) GAO protests must be handled on a priority basis. The appropriate Associate General Counsel (AGC) shall prepare a report for signature of the General Counsel responding to GAO protests. These reports are to be based upon a statement of fact and position prepared by the responsible contracting officer and approved by the contracting director. When requested by the appropriate AGC, the Regional Counsel will prepare a statement of legal position analyzing the merits of a protest concerning a regional procurement.

(3) The following procedures must be followed in handling protests:

(i) When a protest is received by the agency, the AGC shall telephonically notify the contracting officer through the appropriate Central Office contracting activity or Regional Counsel. If the contracting activity or Regional Counsel receives a copy of a protest before being notified thereof by the AGC, they must immediately notify the appropriate AGC.

(ii) After receiving the formal protest, which has been filed with GAO, the AGC will formally request a statement of fact and position from the contracting officer through the appropriate Central Office contracting activity or Regional Counsel. The contracting officer shall immediately notify the affected bidders or offerors that a protest has been received.

(iii) The contracting officer shall notify assigned counsel and begin preparing a documented statement of fact and position immediately upon receiving a protest or notice thereof.

(iv) When completed, the statement of fact and position must be concurred in by the contracting director, and on regional procurements, by the Office of Regional Counsel. In appropriate cases, the AGC may request the Regional Counsel to prepare a legal position analyzing the merits of a protest against a regional procurement. In such cases, the contracting officer's statement of fact and position should be included as a referenced attachment thereto.

(v) The Regional Counsel's legal position, when requested, and the contracting officer's statement of fact and position, must be transmitted to the appropriate AGC, in triplicate. If other interested parties are involved, additional copies may be requested. The statement is due in the office of the appropriate AGC no later than 10 workdays after the date on which the contracting officer originally received the protest. This time may be reduced if GAO invokes the express option. If a contracting officer is unable to prepare a statement of fact and position within 10 workdays, the appropriate AGC must be notified promptly, by telephone, of the reasons for the delay and of the additional time needed. Additional time may be granted if the spe-

cific circumstances of the protest require a longer time. A request for an extension is proper only if the facts or legal issues affecting the resolution of a protest are so complicated that an adequate report cannot be prepared on time; the need to coordinate the report with other agencies, or with offices in distant locations, makes it impossible to prepare the report on time; or other compelling circumstances prevent preparing the report on time. Upon request of the AGC, the contracting officer shall confirm any oral requests for extensions in writing. The contracting director shall concur in the request and send a copy to the HCA. A request for an extension, which will delay submission of the agency's report to GAO beyond 35 days from the date GSA originally received the protest, may be granted only by the GAO. The AGC will notify the Central Office contracting activity or Regional Counsel of the GAO's decision.

(vi) After submitting the statement to the AGC, the contracting officer or Regional Counsel must advise the AGC of all later developments that may affect the case.

(vii) All documents transmitted under these procedures must be sent by the fastest means possible.

(viii) In addition to the requirements of FAR 33.104(a)(5)(ii), a copy of any comments is sent to the AGC.

(4) The Office of General Counsel (OGC) must furnish the GAO with the name, title, and telephone number of one or more officials whom the GAO may contact regarding protests. The OGC is responsible for promptly advising the GAO of any change in the designated officials.

(5) The format for notification required by FAR 33.104(a)(2) is as follows:

Name

Address

A protest concerning Solicitation No. \_\_\_\_\_ has been filed with the General Accounting Office (GAO).

The protest was filed by *(Insert the name and address of the protester, and the name of the person signing the protest.)* on *(Date)*.

Copies of the protest may be obtained from this office.

You may submit your views and relevant information regarding the protest directly to the General Accounting Office. A copy of any

submission to the GAO should be provided to this office.

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Contracting Officer's signature

(b) *Protests before award.* Under FAR 33.104(b), the HCA may determine in writing that urgent and compelling circumstances significantly affecting the interests of the United States do not permit waiting for the decision of GAO and award is likely to occur within 30 days. The written determinations and findings (D&F), in the format shown at 501.704–70(e)(1), should be prepared by the contracting officer for the signature of the HCA. The D&F must be concurred in by the Regional Counsel (on regional procurements), and the appropriate AGC. After the D&F is approved, it must be returned to the appropriate AGC who notifies GAO of the agency's findings and intended action before the award is made.

(c) *Protests after award.* If the protest is received from GAO (not from protester or any other party) within the time periods specified in FAR 33.104(c) contract performance must be suspended unless the HCA determines in writing that contract performance is in the best interests of the United States or that urgent and compelling circumstances that significantly affect the interests of the United States do not permit waiting for the GAO's decision. The written determination and findings (D&F), in the format shown at 501.704–70(e)(2), should be prepared by the contracting officer for signature of the HCA. The D&F must be concurred in by the Regional Counsel (on regional procurements), and the appropriate AGC. After the D&F is approved, it must be returned to the AGC who notifies GAO of the agency's findings and intended action before contract performance is authorized.

(d) *Notice to GAO.* The HCA responsible for the solicitation, proposed award, or award of the contract must report to the Comptroller General through the OGC within 65 days of receipt of the GAO's recommendation if the agency has decided not to comply with the recommendation. The report must explain the reasons why the

GAO's recommendation will not be followed.

[54 FR 26543, June 23, 1989, as amended at 57 FR 61584, Dec. 28, 1992; 61 FR 1151, Jan. 17, 1996]

### 533.105 Protests to GSBCA.

(a) *Notification procedure.* After receiving a protest, the contracting officer shall notify the following:

(1) All firms solicited, or those who have submitted sealed bids or offers if the protest is filed after the closing date of the solicitation, and the appropriate delegating official in the Information Technology Service. When giving such notification, the contracting officer should follow these procedures:

(i) Avoid interpreting or characterizing the nature of the protest.

(ii) Use appropriate means to ensure delivery to all the firms by the workday after the date of filing with the GSBCA.

(iii) Use the following format:

Name (Officer, Managing Agent, or person who signed offer)

Address

A protest concerning Solicitation No. \_\_\_\_\_ has been filed with the General Services Administration Board of Contract Appeals (GSBCA). The protest was filed by *(Insert the name and address of the protester and the name of the person signing the protest.)* on *(Date)*. The protest has been purportedly filed pursuant to Section 2713 of the Competition in Contracting Act, Pub. L. 98–369. Copies of the protest may be obtained from the Office of the Clerk of the GSBCA, 18th and F Streets NW, Washington, DC 20405, or from the contracting officer.

Contracting Officer's signature

(2) The agency on whose behalf GSA is making the procurement, if any. A copy of the protest complaint, including all attachments, must be forwarded to the agency by appropriate means to ensure next day delivery to both the requiring office and the agency's legal office.

(3) *Assigned counsel.* A copy of the protest complaint, including all attachments, must be forwarded to the appropriate AGC by appropriate means to ensure next day delivery.

(4) The Board, through assigned counsel, within 3 workdays after the date of filing with the GSBCA, that the notices described in paragraphs (a)(1)

and (2) have been given. Written confirmation of notice and a listing of all persons and agencies receiving notice must be provided.

(b) *Protest file.* To ensure timely submission, the contracting officer should begin assembly of the protest file by the second workday after receiving the protest. The protest file must be forwarded to assigned counsel by overnight delivery not later than the 8th workday after the protest is filed with the GSBICA. Assigned counsel will distribute the copies to the GSBICA, the protester, and retain one copy for itself. If additional copies are needed, assigned counsel will advise the contracting officer. The following rules govern the assembly of protest files:

(1) *Format.* Protest file exhibits are true, legible, and complete copies. They must be arranged in chronological order within each submission, earliest documents first, bound on the left margin except where size or shape makes such binding impracticable, numbered, tabbed, and indexed. The numbering must be consecutive, in whole arabic numerals (no letters, decimals, or fractions), and continuous from one submission to the next, so that the complete file, after all submissions, will consist of one set of consecutively numbered exhibits. The index should include the date and a brief description of each exhibit and indicate which exhibits, if any, have been filed with the Board in camera (see (b)(3) of this section) or otherwise not served on every other party.

(2) *Contents.* In addition to the items required by FAR 33.105(b), the contents should include those items required by GSBICA Rule 4(a), when appropriate. (See 48 CFR 6101.4(a).)

(3) *Confidential, privileged, or proprietary information.* The protest file may require the inclusion of documents and information from other vendors which are confidential, proprietary, or privileged. When such information is required to be included in the protest file, it is to be placed only in the copies going to the Board and to assigned counsel. Copies going to other interested parties will only identify the information in the index. However, the index must not reveal the number and identity of the offerors whose proposals

are included in the copies of the protest file going to assigned counsel and the GSBICA, and should include an identifying statement, e.g., "proposals being considered for award."

(c) *Protest conference.* Within 6 working days of filing a protest, a conference may be convened by the Board to establish further proceedings for the protest. Although the protest file and answer will most likely not have been filed, the Government must be prepared to discuss the issues in the protest, whether a record submission or hearing is desired, and other matters raised by the Board or any other interested party. The Government must also be prepared, if required, to object to the scope of discovery in any protest action.

(d) *Procedure following decision of the GSA Board of Contract Appeals.* (1) Upon a Board decision (oral or written) to suspend procurement authority pending a decision on the merits of a protest, the contracting officer, in conjunction with the appropriate AGC, shall comply with the suspension decision.

(2) If the Board suspends performance of a contract for automatic data processing goods and services, the contracting officer shall take immediate action to comply with the suspension decision (40 U.S.C. 759(h)(3)(B)). Such suspension will be effective as directed by the Board.

(3) If the Board revokes, suspends, or revises procurement authority after the award of a contract for ADP resources, the contracting officer shall consider the contract valid as to all goods or services delivered and accepted before the Board's decision (40 U.S.C. 759(h)(6)(B)).

[54 FR 26543, Jun. 23, 1989, as amended at 59 FR 22520, May 2, 1994; 59 FR 29480, June 7, 1994; 61 FR 1152, Jan. 17, 1996]

## Subpart 533.2—Disputes and Appeals

### 533.214 Contract clause.

The contracting officer shall insert the clause at 552.233-70, Disputes (Utility Contract), in solicitations and contracts for utility services. This clause supplements the Disputes clause at FAR 52.233-1.

### Subpart 533.71—Processing Contract Appeals

#### 533.7100 Definitions.

*Assigned Counsel* means the attorney employed by the Office of General Counsel (including offices of Regional Counsel) assigned to provide legal review or assistance.

*Associate General Counsel* means the Associate General Counsel of the General Law Division, Personal Property Division, or Real Property Division.

#### 533.7101 Notice of appeal.

(a) Notices of appeal are to be addressed to the GSA Board of Contract Appeals along with a copy to the contracting officer. Final decisions must be appealed within 90 calendar days from the date the decision of the contracting officer is received. Any request for an extension of the 90-day appeal period will be denied.

(b) If the notice of appeal was mailed or otherwise submitted to the contracting officer in an untimely manner, a separate letter, signed by the contracting director, shall be sent to the AGC, requesting that a motion for dismissal of the appeal be submitted to the GSA Board of Contract Appeals (the Board). The letter shall state the name of the appellant, contract number, and date of the contracting officer's final decision, and must be accompanied by (1) the certified mail receipt showing the date on which the appellant received the contracting officer's final decision, and (2) the envelope which contained the notice of appeal or other evidence of late submission of the notice of appeal.

#### 533.7102 Contents of notices of appeal.

A notice of appeal must be in writing and should indicate that an appeal is thereby intended, should identify the decision and the date thereof from which the appeal is taken, the GSA office cognizant of the dispute, and the number of the contract in question. The appeal should describe the nature of the dispute and the relief sought, the contract provisions involved, and any other additional information or comments relating to the dispute which are considered to be important. The notice of appeal must be signed personally by

the appellant (the prime contractor making the appeal) or by an officer of the appellant corporation, or member of the appellant firm, or by the contractor's duly authorized representative or attorney.

#### 533.7103 Appeal files.

(a) Appeal files must be prepared in accordance with this section and forwarded, after concurrence by assigned counsel, to the appropriate AGC within 20 calendar days after receipt of the notice of appeal or advice that an appeal has been filed unless the AGC advises that the Board requires a shorter period under its small claims procedures. In the event the time for submission of the appeal file cannot be met, the contracting officer shall submit in writing a full explanation and a request for additional time to the AGC, before expiration of the designated time.

(b) Upon receipt of the notice of appeal, the contracting activity must establish a record to ensure the timely preparation and submission of appeal cases. The record must show, as a minimum, the name of the appellant, the date of the contracting officer's final decision, the date the appeal was filed, contract number, docket number, and name of the contracting officer.

#### 533.7103–1 Preparation of the appeal file.

(a) *General.* Appeal files must be prepared in quadruplicate. Each file is identified by the name of the appellant, contract number, and docket number. All copies of the appeal file must be identical both as to content and position of items. If more than one appeal is filed under the same contract, upon request to, and waiver by, the Board, the appeal file for the second and subsequent appeals need not duplicate the documents included in the first appeal file, but must make reference to the appeal file which contained such documents, including the docket and item numbers. However, if changes to such documents occur subsequent to preparation of the original file, these changes must be appropriately identified and included in the later appeal file. Such files must also include any documents pertinent to the

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later appeal but not previously furnished.

(b) *Content of appeal file.* (1) Each appeal file must be assembled in a loose-leaf binder. A gummed label (NSN 7510-00-264-5460) must be used on top of the looseleaf binder to identify the case by contractor, contract number and dock-et number.

(2) Individual appeal files must not be more than 1 inch thick. If the file will be more than 1 inch thick, two or more consecutive binders must be used and identified with the appropriate exhibit numbers contained in each.

(3) Each document to be included in the appeal file (i.e., letter, telegram, memo, report, invoice, etc.) must be legible, complete, included as a separate exhibit in the file, and listed in the "Index of Exhibits" by exhibit number and brief description. If a document cannot be legibly reproduced, the unaltered document must be submitted with an attached accurate typewritten transcription thereof. Assigned counsel will assist the contracting officer in determining which documents are relevant to the issue in the appeal or not privileged for inclusion in the appeal file.

(4) Each appeal file must contain division sheets separating the different documents listed in the "Index of Exhibits." Division sheets must be tabbed and numbered consecutively commencing with number one, in whole Arabic numbers (no letters, decimals, or fractions), and continuously from each file to the next so that the complete appeal file will consist of one set of consecutively numbered appeal file exhibits. In addition, the pages within the exhibit shall be numbered consecutively unless the exhibit already is paginated in a logical manner. Consecutive pagination of the entire file is not required.

(c) *Arrangement of documents.* (1) The first (top) document in the appeal file must be the "Index of Exhibits." The index must list, opposite each exhibit number, the date and a brief description of the document and must indicate which exhibits, if any, have been filed with the Board but not served on the other party because of their length or bulk. The exhibits must be arranged in chronological order, earliest document

first (as exhibit 1), and be separated by tabs for identification. For example:

	Exhibit	Date
Copy of basic contract, including referenced terms and conditions and any amendments .....	1	5/20/88
Notice of award. ....	2	5/20/88
Notice to proceed and facsimile of Post Office receipt .....	3	6/5/88
Contractor's request for final decision or other documents of claim in response to which the decision was issued .....	4	8/5/88
Contracting officer's final decision letter applicable to the dispute and facsimile of Post Office receipt .....	5	8/25/88
Notice of Appeal with attachment, if any. ....	6	9/10/88
Board of Contract Appeals acknowledgement of contractor's Notice of Appeal .....	7	9/15/88

(2) In addition to the exhibits listed in (c)(1) of this section, other pertinent exhibits, such as the following, should be included and exhibited as applicable, in chronological order:

(i) Copy of the repurchase contract, including referenced terms and conditions.

(ii) Copies of specifications/drawings applicable to the dispute.

(iii) Copy of the abstract of offers and list of all offerors solicited for the repurchase contract.

(iv) Copy of letter of assessment, including worksheet showing calculation of excess costs and/or other damages including administrative costs.

(v) Copies of defaulted purchase/delivery orders.

(vi) Copies of purchase/delivery orders issued under the repurchase contract.

(vii) Proof of payment and a detailed disbursement listing, annotated and certified, if applicable.

NOTE: The information and documents needed must be obtained from the appropriate GSA finance office. The finance information will include a detailed disbursement listing, annotated with the check number and date, and the amount applicable to the repurchase order if different from the check amount. The disbursement listing will be certified by an appropriate finance division official whose title and date of signature will also be shown.

(viii) Evidence of certification of the claim or claims, as applicable.

(ix) All other correspondence between the Government and the contractor relevant to the appeal.

(x) All documents and other physical evidence on which the contracting officer relied in making a decision.

[54 FR 26543, June 23, 1989, as amended at 59 FR 22520, May 2, 1994]

**533.7103-2 Transmittal of the appeal file.**

(a) The original and two copies of the appeal file must be forwarded to the AGC by a transmittal letter from the contracting director. The appeal file must be accompanied by the contracting officer's detailed statement of facts in a memorandum of position as a separate document which must be concurred in by assigned counsel who will also prepare and attach a statement of legal position. In addition, a list of recommended witnesses and the Government's estimate (when appropriate) of the amount of any claim in the event of an adverse decision must be prepared. A point of contact must be given to the AGC; name of individual, position, title, and telephone number.

(b) The contracting officer shall retain one copy of the appeal file.

(c) After reviewing the appeal file for adequacy, the trial attorney in the Office of General Counsel will transmit the appeal file to the Board and serve a copy of the appeal file upon appellant.

**533.7104 The contracting officer's memorandum of position.**

The memorandum of position is a chronological summary of the actions leading to the dispute and a rationale of the contracting officer's actions for the information of the trial attorney. The memorandum of position is submitted to the AGC simultaneously with the appeal file, but as a separate document; i.e., it will not be included as part of the appeal file or included in the index. Although no particular form is prescribed, the statement must identify the contract, state the nature of the contractor's claim, cite pertinent portions of the contract, state the contracting officer's decision with citations to pertinent contract provisions and a supporting explanation, and set out any new facts which may have developed since the decision was made.

The contracting officer shall sign the memorandum of position.

**533.7105 Procedure following decision of the GSA Board of Contract Appeals.**

(a) Decisions of the Board will be promptly implemented. However, it must be recognized that the contractor may decide to appeal a Board decision in the United States Court of Appeals for the Federal Circuit. It is also possible for either party to file a motion for reconsideration by the Board within 30 calendar days from the date of the receipt of a copy of the Board decision. If further appeal of a decision or a motion for reconsideration of a decision is contemplated, the implementation of the decision may be postponed; if the issue is over quantum, however, consideration should be made to making payment of the undisputed amount to minimize interest to be paid the contractor.

(b) The contracting officer need not take any further action (other than administrative) if the Board affirms the contracting officer's original decision, provided a recovery of costs is not due from the contractor. Where a recovery is due, collection must be initiated by the contracting officer either by (1) a contract amendment adjusting the contract price or (2) a written demand for immediate payment, as appropriate. (In excess cost cases, Office of Finance will normally pursue the necessary collection.) Any written demand must instruct the contractor to make payment to the General Services Administration and address it to the appropriate GSA finance office. A copy of any written demand must be provided to the appropriate GSA finance office for information and followup.

(c) In appeals brought under the disputes clause of the contract, when the Board does not uphold the contracting officer's original decision and the Board's decision provides for payment in favor of the contractor, the contracting officer shall prepare a supplemental agreement with concurrence of assigned counsel. The supplemental agreement will ensure against further

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litigation of the same dispute. The contracting officer shall forward the recommendation for payment to the appropriate finance office with the original of the supplemental agreement and a copy of the Board's decision.

(d) In appeals brought under the Contract Disputes Act of 1978, when the Board does not uphold the contracting officer's original decision and the Board's decision awards the contractor an amount of money, and the AGC informs the contracting officer that the

Government will not move for reconsideration of the Board's decision or appeal it to the United States Court of Appeals for the Federal Circuit, the contracting officer must complete the Certificate of Finality attached to the copy of the Board's decision and return it to the Board. The Board will forward the Certificate of Finality, completed by both parties, and a certified copy of its decision to the United States General Accounting Office to be certified for payment to the contractor.